

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 15-6922

JORDAN JOSEPH KINARD,

Petitioner - Appellant,

v.

HAROLD W. CLARKE, Director of the Virginia Department of
Corrections,

Respondent - Appellee.

Appeal from the United States District Court for the Eastern
District of Virginia, at Norfolk. Arenda L. Wright Allen,
District Judge. (2:14-cv-00553-AWA-DEM)

Submitted: November 13, 2015

Decided: March 17, 2016

Before MOTZ, FLOYD, and HARRIS, Circuit Judges.

Vacated and remanded by unpublished per curiam opinion.

Jordan Joseph Kinard, Appellant Pro Se. Katherine Quinlan
Adelfio, OFFICE OF THE ATTORNEY GENERAL OF VIRGINIA, Richmond,
Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Jordan Joseph Kinard appeals the district court's order adopting the magistrate judge's report and recommendation and dismissing his 28 U.S.C. § 2254 (2012) petition. In its order, the district court stated that Kinard had filed no objections to the report and recommendation despite having been warned of the consequences of failing to object. On appeal, Kinard claims that he did not receive the report and recommendation, making it impossible to object. He provides documentary support for his claim.

A party who fails to object in writing to a magistrate judge's proposed findings of fact and conclusions of law is not entitled to de novo review of the magistrate judge's determinations and is barred from contesting those determinations on appeal. Wright v. Collins, 766 F.2d 841, 845-46 (4th Cir. 1985). The waiver is a result of procedural default and does not affect jurisdiction. Thomas v. Arn, 474 U.S. 140, 154 (1985). When a litigant is proceeding pro se, he must be given fair notice of the consequences of failing to object before a procedural default will apply. Wright, 766 F.2d at 845-46.

From the record presented, we cannot conclusively determine whether Kinard received a copy of the report and recommendation. Accordingly, we vacate the decision of the district court and

remand for the district court to make this determination in the first instance. Should the district court find Kinard's claim to be credible, it should provide him with a copy of the report and recommendation and afford him an opportunity to object. If, however, the court finds that Kinard did receive the report and recommendation, it may reenter its original order, with any necessary modifications.

We grant leave to proceed in forma pauperis and dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

VACATED AND REMANDED